

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GGH, INC., a California)	Case No. 10-1832 SC
corporation,)	
)	ORDER SETTING ASIDE DEFAULT
Plaintiff,)	AND DENYING MOTION FOR
)	<u>DEFAULT JUDGMENT</u>
v.)	
)	
IGROW LLC, a California limited)	
liability company, and DHARMINDER)	
MANN, an individual,)	
)	
Defendants.)	
)	
)	

I. INTRODUCTION

Before the Court is a fully briefed Motion to Set Aside Default filed by Defendants IGROW LLC ("IGROW") and Dharinder Mann ("Mann") (collectively, "Defendants"). ECF Nos. 29 ("Mot."), 40 ("Opp'n"), 43 ("Reply"). Also before the Court is a fully briefed Motion by Plaintiff GGH, Inc. ("Plaintiff") for Entry of Default Judgment against Defendants. ECF Nos. 21 ("Mot. for Default J."), 28, 37. For the following reasons, the Court GRANTS Defendants' Motion and DENIES Plaintiff's Motion as moot.

II. BACKGROUND

Plaintiff filed this action on April 28, 2010. ECF No. 1 ("Compl.") In its Complaint, Plaintiff alleged that its rights in

1 its registered service mark IGROWHYDRO were infringed by
2 Defendants. Id. ¶ 4. Specifically, Plaintiff alleged that it
3 sells hydroponic equipment online under the IGROWHYDRO mark using
4 the igrowhydro.com Internet domain name. Id. ¶ 7, 8. Plaintiff
5 alleged that Defendants registered and used two Internet domain
6 names, igrow420.com and igrowoakland.com, in conjunction with the
7 sale of hydroponics products and services in Oakland, California.
8 Id. ¶ 4. Plaintiff also claimed that Defendants opened up a retail
9 store in Oakland, California under the name IGROW on or about
10 January 28, 2010. Id. ¶ 13. Plaintiff alleged that Mann "controls
11 the activities of Defendant IGROW," and in furtherance of these
12 activities, he registered the two above domain names. Id.
13 Plaintiff alleged that the IGROW mark is confusingly similar to
14 Plaintiff's IGROWHYDRO mark. Id.

15 Plaintiff's Complaint lists eight claims: (1) infringement of
16 a registered service mark under 15 U.S.C. § 1072; (2) false
17 designation of origin under 15 U.S.C. § 1125(a); (3) dilution under
18 15 U.S.C. § 1125(c); (4) cybersquatting in violation of 15 U.S.C. §
19 1125(d)(1); (5) unfair competition and trademark infringement under
20 California law; (6) trademark dilution under section 14247
21 California Business and Professions Code; (7) unfair competition
22 under section 17200 of California Business and Professions Code;
23 and (8) false advertising under section 17500 of California
24 Business and Professions Code. Compl. ¶¶ 19-66.

25 IGROW was served with the Complaint on August 25, 2010. ECF
26 No. 12 ("Proof of Service on IGROW"). Plaintiff filed a motion for
27 additional time to serve Mann, which the Court granted. ECF Nos.
28 13, 14. On September 8, 2010, Plaintiff filed Proof of Service of

1 the Complaint on Mann. ECF No. 15 ("Proof of Service on Mann").
2 In this document, the process server alleges that Mann was served
3 on August 26, 2010, by substituted service on "Tony Alta, persin
4 [sic] in charge" at 70 Hegenberger Loop, Oakland, California,
5 94601. Id.

6 Plaintiff moved for entry of default on IGROW and Mann on
7 September 27, 2010. ECF Nos. 17, 18. The Clerk of the Court
8 entered default against both Defendants on September 30, 2010. ECF
9 No. 19. On December 31, 2010, Plaintiff filed its Motion for
10 Default Judgment, noticing a January 7, 2011 hearing. See Mot. for
11 Default J. The Court terminated this Motion for failure to
12 properly notice the hearing, and on January 3, 2011, Plaintiff
13 renoticed it for a February 11, 2011 hearing. ECF No. 27.

14 On February 10, 2011 -- the eve of the hearing date --
15 Defendants filed a late Opposition, a motion to shorten time, and
16 the now-pending Motion to Set Aside the Default. ECF Nos. 32, 33,
17 34. The Court granted Defendants' motion to shorten time,
18 continuing the February 11, 2011 hearing to March 4, 2011, and
19 deeming Defendants' Opposition to be filed timely. ECF No. 35.

20 21 **III. LEGAL STANDARD**

22 Under Federal Rule of Civil Procedure 55(c), a court "may set
23 aside an entry of default for good cause." In determining whether
24 good cause exists, a court considers (1) whether the party's
25 culpable conduct led to the default; (2) whether the party has a
26 meritorious defense; and (3) whether reopening the case would
27 prejudice the opposing party. TCI Group Life Ins. Plan v.
28 Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). Because these factors

are "disjunctive," a court is "free to deny the motion if any of the three factors [is] true." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104 1108 (9th Cir. 2000). The court's discretion to set aside a default is "especially broad," Mendoza v. Wight Vineyard Mgmt., 783 F.2d 941, 945 (9th Cir. 1986), as "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984).

IV. DISCUSSION

Defendants argue that all three factors favor setting aside the default, alleging that their failure to respond to the Complaint was due to excusable neglect and not due to their culpable misconduct; that Plaintiff's claims "are significantly flawed on their face;" and that Plaintiffs will suffer no prejudice if the default is set aside. Mot. at 5.

In alleging that their failure to respond to the Complaint and the entry of default constitutes excusable neglect, Defendants offer the following timeline. In a declaration filed in support of Defendants' Motion, Mann claims that he is the founder of IGROW. Mann Decl. ¶ 2.¹ Mann declares that he received a letter from Plaintiff's attorney shortly after opening IGROW's Oakland store in January 2010, and that he subsequently spoke with his business counsel, Hussein Saffouri ("Saffouri"), who then contacted Plaintiff's counsel. Id. ¶ 4. Mann alleges that in response to the suit, he changed the name of the business from IGROW to WEGROW GARDEN SUPPLY. Id.

¹ ECF No. 31.

1 In a declaration by Saffouri filed in support of Defendants'
2 Motion, ECF No. 36, Saffouri states that he contacted Plaintiff's
3 counsel by e-mail on or about June 6, 2010. Saffouri Decl. ¶ 5.
4 Saffouri claims that in subsequent telephone conversations with
5 Plaintiff's counsel, he advised Plaintiff of Defendants' plans to
6 cease the use of the IGROW name, replacing it with the name WEGROW
7 GARDEN SUPPLY, and suggested that Plaintiff dismiss the action.
8 Id. Saffouri claims Plaintiff's counsel informed him that he would
9 discuss the matter with his client, and report back to Saffouri.
10 Id. Saffouri claims that he never received a response, and that he
11 was not sent a copy of Plaintiff's Motion when it was filed. Id. ¶
12 7. Saffouri concludes:

13 I believe my clients' failure to respond to the
14 complaint or entry of default in a more timely
15 manner is excused by plaintiff's conduct. I
16 assumed that plaintiff's counsel would direct
17 communications and serve documents on me after
18 I made it clear that I was representing them in
19 this matter, but they did not. My client
assumed, erroneously, that I would be served
with communications by plaintiff's counsel, and
that I was therefore able to take action on
defendants' behalf. Had plaintiff's counsel
communicated with me, as they should have, none
of this delay would have occurred.

20 Id. ¶ 8.

21 In response, Plaintiff alleges: "Plaintiff consistently
22 notified Defendants that it intended to aggressively protect its
23 intellectual property rights and seek the maximum penalties under
24 the law through court action should the parties not reach a
25 mutually agreeable resolution." Id. at 3. This allegation is not
26 supported by a declaration.

27 Mann also alleges that he was never personally served with the
28 summons and complaint. Id. ¶ 5. Mann states that 70 Hegenberger

1 Loop -- the address that the documents were sent -- is a business
2 address, and the person served -- Tony Alta -- was not authorized
3 to receive or accept service of process on Mann's behalf. Id.

4 Defendants argue that they have meritorious defenses to
5 Plaintiff's Complaint, and that portions of Plaintiff's Complaint
6 "appear weak or defective" on its face. Mot. at 5. In particular,
7 Defendants allege that there is no evidence of IGROWHYDRO's
8 strength as a mark; of similarity between Plaintiff's IGROWHYDRO
9 mark and Defendants' IGROW mark; that the IGROWHYDRO mark is famous
10 -- a requirement for an action for dilution under 15 U.S.C. §
11 1125(c); and of damage to Plaintiff. Id. at 5-7. In response,
12 Plaintiff argues that its Complaint is meritorious, largely by
13 restating the allegations made in its Complaint. Opp'n at 9-10.

14 Finally, Defendants argue that Plaintiff will not be
15 prejudiced if the default is set aside. Mot. at 8-9. Defendants
16 argue: "Plaintiff did not attempt to serve its complaint for four
17 months. The case is now almost ten months old -- plaintiff's
18 doing." Id. at 9. In response, Plaintiff alleges that Defendants
19 "sought to manipulate the legal process and take advantage of
20 Plaintiff by waiting to defend this action" until Defendants
21 received a favorable ruling from the U.S. Patent and Trademark
22 Office on their application for use of the mark WEGROW GARDEN
23 SUPPLY. Opp'n at 7.

24 In light of the above, the Court concludes that all three
25 factors favor setting aside the default. The parties dispute the
26 facts leading up to the entry of default. As Defendants tell it,
27 counsel for Plaintiff and Defendants were engaged in settlement
28 discussions, and Plaintiff failed to serve its motions for entry of

1 default and default judgment on Defendants' counsel. As Plaintiff
2 tells it, Defendant Mann evaded service and ignored the motions
3 filed. Because Defendants' allegations are supported with relevant
4 declarations and Plaintiff's are not, the Court finds Defendants'
5 story to carry more weight.

6 Furthermore, while Plaintiff alleges that it served Mann
7 through substituted service, this service is defective. Rule 4(e)
8 of the Federal Rules of Civil Procedure permits a party to serve a
9 person through the law of the state where service is made. Section
10 415.20(b) of California's Code of Civil Procedure authorizes
11 substituted service at a person's usual place of business, "[i]f a
12 copy of the summons and complaint cannot with reasonable diligence
13 be personally delivered to the person to be served." The party
14 seeking substituted service must file an affidavit of the process
15 server showing reasonable diligence in attempting personal service.
16 David S. Karton, a Law Corp. v. Dougherty, 171 Cal. App. 4th 133,
17 137 (Ct. App. 2009). No such affidavit has been filed here. As
18 such, the Court finds that the first factor tips in favor of
19 setting aside the default.

20 The Court also finds that Defendants have raised meritorious
21 defenses to the Complaint -- in particular, Defendants' defenses to
22 Plaintiff's dilution claim are meritorious, given the fact that
23 Plaintiff must establish its IGROWHYDRO mark is famous in order to
24 prevail.

25 Finally, there is no reason for the Court to conclude that
26 Plaintiff will be unduly prejudiced if the default is set aside.
27 While it is true that nearly one year has passed since Plaintiff
28 commenced this action, as Defendants point out, Plaintiff did not

1 serve Defendants with the Complaint until four months after it was
2 filed. Furthermore, Defendants' Motion for Default Judgment was
3 filed three months after the clerk entered default. Thus, more
4 than half of the delay is attributable to Plaintiff. While
5 Plaintiff would not have incurred the expense of filing a motion
6 for default judgment if Defendants had responded to the Complaint,
7 this alone is an insufficient reason to deny Defendants the
8 opportunity to defend the action and reach a decision on the
9 merits.²

10
11 **V. CONCLUSION**

12 For the foregoing reasons, the Motion to Set Aside Default
13 filed by Defendants IGROW, LLC and Dharminder Mann is GRANTED.
14 Plaintiff GGH, Inc.'s Motion for Default Judgment is DENIED as
15 moot. Defendants must file their Answer or otherwise respond to
16 Plaintiff's Complaint within twenty-one (21) days of the date of
17 this Order; should Defendants fail to do so, the Court will enter
18 default judgment in Plaintiff's favor.

19
20 IT IS SO ORDERED.

21
22 Dated: April 11, 2011

23 
UNITED STATES DISTRICT JUDGE

24
25
26 _____
27 ² In the final paragraphs of its Opposition, Plaintiff requests the
28 Court award it \$43,281.61 in attorneys' fees and costs "incurred as
a direct result of this litigation." Opp'n at 11. This request is
DENIED as procedurally improper. To seek an award of attorneys'
fees and costs against Defendants, Plaintiff must file the
appropriate motion.